TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 1296.

THE CAMBRIA IRON COMPANY, APPELLANT,

vs.

THOMAS Q. ASHBURN, TRUSTEE OF THE FIRST MORTGAGE BOND-HOLDERS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED MARCH 22, 1886.

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INDEX.

	Original.	Print.
Caption	1	1
Transcript from State court	2	1
Clerk's certificate	2	1
Petition of plaintiff	2	1
Defendant's waiver of service of summons	7	4
Attorney's authority to waive service of summons	7	4
Answer and cross-petition of W. R. McGill	9	5
Defendant's waiver of service of summons	12	6
Journal entry (order appointing receiver)	13	6
(order approving bond)	17	8
Receiver's bond (missing)	17	8
Journal entry (order to pay operators, &c.)	17	9
(order making trustees party)	18	9
Waiver of service of summons by trustees	18	9
Motion of M. R. McGill	19	9
Journal entry (authority to complete road)	22	11
(leave to trustees to plead)	25	12
Amendment to petition	25	12
Separate answer of R. M. Shoemaker, trustee, &c.	31	15
Answer and cross-petition of the Lomas Forge and Bridge Co.	35	17

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	Original.	Print.
Journal entry	38	18
Answer and cross-petition of The Cambria Iron Co.	41	19
Answer of Post and Co.	44	21
Cross-petition of D. M. Richardson	47	22
Journal entry (order to purchase rolling stock)	49	23
Answer and cross-petition of trustees	50	24
Demurrer to The Cambria Iron Co. cross-petition	53	25
Journal entry (order of reference)	54	26
Journal entry (master's report filed and costs of reference to be taxed, &c.	56	27
Petition for removal	56	27
Bond for removal	58	28
Motion to remand cause	60	29
Journal entry (remanding cause)	61	29
Appeal bond	63	30
Affidavit of surety	64	30
Citation (with marshal's return endorsed)	66	31
Clerk's certificate	67	32
Stipulation as to record, &c.	68	32

1 At a stated term of the circuit court of the United States within and for the sixth judicial circuit and the western division of the southern district of Ohio, begun and held at the court-rooms in the city of Cincinnati, in the said division and district aforesaid, on the first Tuesday of February, being the second day of that month, in the year of our Lord one thousand eight hundred and eighty-six, and in the one hundred and tenth year of the Independence of the United States of America—present, the Honorable John Baxter, circuit judge—among the proceedings had were the following, to wit:

STEPHEN FEIKE
vs.
CINCINNATI AND EASTERN RAILWAY COMPANY. } 3848. Chancery.

Be it remembered that heretofore, to wit, on the second day of February, in the year of our Lord one thousand eight hundred and eighty-six, came the Cambria Iron Company, intervening petitioners herein, by Ramsey, Maxwell, and Matthews, its solicitors, and filed in the clerk's office of the court aforesaid in this cause a certain transcript of proceedings theretofore had in this cause in the common pleas court of Clinton county, Ohio, certain portions of which
2 transcript so as aforesaid filed are clothed in the words and figures as follows, to wit:

Transcript.

THE STATE OF OHIO, } *ss:*
Clermont County, }

In the Court of Common Pleas.

STEPHEN FEIKE, Plaintiff,
vs.
THE CINCINNATI AND EASTERN RAILWAY COMPANY, Defendant. } No. 7840.

I, A. B. Shaw, clerk of the court of common pleas within and for the county of Clermont, do hereby certify that the following entries and judgments are truly copied from the journals of said court, to wit: Sept. 14th, 1883, petition filed in words and figures following:

Petition.

Court of Common Pleas, Clermont County, Ohio.

STEPHEN FEIKE, Plaintiff,
[*vs.*]
THE CINCINNATI AND EASTERN RAILWAY COMPANY, Defendant.

The plaintiff says:

I. *Cause of Action.*

1. The defendant, the Cincinnati and Eastern Railway Company, is a corporation duly chartered, organized, and authorized by and

under the laws of the State of Ohio, and by its charter is authorized to construct, maintain, and operate a railroad running from the city of Cincinnati, Ohio, to the city of Portsmouth, in Scioto county, Ohio.

3 That said company has already constructed and has for a long time past been operating said railroad through the counties of Hamilton, Clermont, Brown, Adams, and Scioto, in said State, a distance of about ninety miles, under the direction and control of its board of directors; that said company has in its possession and under its control and is the owner of a large amount of rolling-stock, consisting of locomotives, cars, coaches, and tools, and the necessary fixures to maintain and operate a railroad, and that said company is now the owner of and in possession and control of said railroad track, hereinbefore mentioned, together with depots, stations, and water tanks, and rights of way over and upon lands upon which said road is now constructed, operated, and located, together with all the rights, privileges, and franchises granted by said charter.

2. The plaintiff further says that on the 1st day of December, 1882, the defendant, The Cincinnati and Eastern Railway Company, made and delivered to the plaintiff its promissory note, of which the following is a copy, to wit:

"$6,300.00. CIN'TI, *Dec.* 1*st*, 1882.

"Four months after date The Cincinnati and Eastern Railway Co. promises to pay to the order of S. Feike sixty-three hundred dollars and interest at 8%.

"THE CINCINNATI AND EASTERN RAILWAY CO.,
"By W. R. McGILL, *President.*"

3. There are no credits upon said note and no payments have been made thereon.

4 4. There is now due from the defendant to the plaintiff on said note the sum of sixty-three hundred ($6,300.00) dollars, and interest thereon from Dec. 1st, 1882, at the rate of eight per cent. per annum, and for which sum he asks judgment, together with costs of suit.

II. *Cause of Action.*

The plaintiff for a second cause of action says that he refers to the facts stated and allegations contained in the first paragraph of his first cause of action and makes the same a part of this his second cause of action.

2. The plaintiff further says that on the 20th day of April, 1883, the defendant, The Cincinnati and Eastern Railway Company, made and delivered to the plaintiff its certain promissory note, of which the following is a true copy, to wit:

"$18,300.00. CINCINNATI, O., *April 20th*, 1883.

"Three months after date The Cincinnati and Eastern Railway

Company promises to pay to the order of Stephen Feike eighteen thousand three hundred dollars, value received, with int. at 8%.

"THE CINCINNATI & EASTERN RAILWAY CO.,
"By W. R. McGILL, *President.*"

3. There are no credits upon said note and no payments have been made thereon.

4. There is now due from the defendant to the plaintiff on said promissory note the sum of eighteen thousand three hundred
5 ($18,300.00) dollars, with interest thereon from the 20th day of April, 1883, at the rate of 8 per cent. per annum, for which sum, together with costs, the plaintiff asks for judgment.

5. There is now due from the defendant to the plaintiff on the notes above mentioned in his first and second causes of action the sum of twenty-four thousand six hundred $24,600.00) dollars, with 8 per cent. interest on sixty-three hundred ($6,300.00) dollars thereof from December 1st, 1882, and eight per cent. interest on eighteen thousand three hundred dollars ($18,300.00) thereof, which he claims, for which he asks judgment.

III. *Cause of Action.*

The plaintiff further says that said railroad company is largely indebted to him for the construction of parts of said road over and above the amounts of said notes set forth in his first and second causes of action, and interest upon bonds issued by said company, which interest upon bonds is long since due and unpaid, and is also largely indebted to various other persons, bondholders, for interest upon bonds, trainmen, trackmen, and persons who have furnished labor, material, and supplies for the construction and operation of said road; that many of said creditors have obtained judgments against said company, and others are threatening to bring suits against said company for their said causes; that there
6 are now many suits pending in said counties through which said road runs against said company.

That said company has failed, refused, and neglected to apply the earnings of said road to the payment of its said indebtedness, as it was bound to do.

The plaintiff further avers that the said railroad company is totally insolvent and unable to pay its indebtedness, and its various creditors, who now have judgments, are seeking to enforce the coltion of the same by executing and levying on the property of said company. The plaintiff therefore prays that a receiver may be appointed to take charge of all and singular the said railroad of said company, with its appurtenances, franchises, rolling-stock, equipment of all kinds whatsoever, depots, stations, rights of way, and all properties whatsoever belonging to said company, with power to operate and control said road in as full and free a manner as the said company might do, with such order and direction in respect to said receivership as the court shall deem equitable and proper, and for such further and other order as equity may require.

C. W. WATERS,
Attorney for Plaintiff.

STATE OF OHIO, }
Clermont County, } ss:

Stephen Feike, the foregoing-named plaintiff, being sworn, says that the fact stated and allegations in his foregoing petition are, as he believes, true.

7 STEPHEN FEIKE.

Sworn to by said Stephen Feike before me, and by him subscribed in my presence, this 13th day of September, A. D. 1883.

[L. S.] ALBERT SWING,
Notary Public in and for Clemont County, O.

SEPTEMBER 14TH, 1883.

Now comes the defendant in the above action, the Cincinnati and Eastern Railway Company, by its authorized attorneys, and waives the issuing and service of process on the foregoing petition of Stephen Feike, and enters its appearance herein and waives notice of the application of said Stephen Feike for the appointment of a receiver in said action.

THE CINCINNATI & EASTERN
RAILROAD COMPANY,
By THOS. B. PAXTON, *Attorney.*

(Waiver of service indorsed by Thos. B. Paxton.)

SEPTEMBER THE 14TH, 1883.

Authority to waive the issuing and service of process filed in words and figures following, to wit:

Whereas the board has been duly notified by Stephen Feike that he will at once make application to some court of competent jurisdiction in the county of Clermont or Brown for the appointment of a receiver for the Cincinnati & Eastern —, and whereas a successful resistance cannot be made to the same: Therefore,

Resolved, That Thomas B. Paxton, the duly-authorized
8 counsel of said Cincinnati and Eastern R'y Company, be, and he hereby is, fully authorized and empowered to appear in any court of competent jurisdiction in which said application shall be made, and for and on behalf of said company waive the issue and service of summons and enter its appearance to such proceeding, and consent to the appointment of such receiver, with full power and authority to take possession of the railway of said company, and all its property and maintain and operate the same under the authority of the court.

The foregoing is a full and true copy of a resolution passed by the board of directors of the Cincinnati and Eastern Railway Company at a meeting thereof held in Cincinnati, Ohio, on Thursday, Sept. 13th, 1883, as the same appears upon the record of the proceedings of said meeting now in my possession.

Signed and dated this 13th day of September, 1883.

[SEAL.] WILLIAM MANSFIELD,
Secretary of the Cin. & East. R'y Co.

9 SEPT. THE 14TH, 1883.

Answer and cross-petition of W. R. McGill filed in the words and figures following, to wit:

Answer and Cross-Petition.

THE STATE OF OHIO, *Clermont County:*

Court of Common Pleas.

STEPHEN FEIKE, Plaintiff,
against
THE CINCINNATI AND EASTERN RAILWAY CO., Defendant.

Now comes W. R. McGill and, by leave of the court, makes himself a party defendant in the above action, and, by like leave, files herein this his answer and cross-petition, and, by way of answer and cross-petition, says:

1st. The facts stated and allegations set forth in plaintiff's petition are, as he believes, true.

2nd. This defendant further says that he also is largely a creditor of the defendant, The Cincinnati and Eastern Railway Company, and as part of the indebtedness of said railway company to the defendant, he says, said railway company, on the first day of March, 1883, for value received, made and delivered to this defendant its promissory note of that date, and thereby promised to pay to the order of this defendant seven thousand dollars ninety days after the date thereof, with eight per cent interest thereof from date, of which promissory note the following is a copy, to wit:

10 "$7,000.00. CINCINNATI, OHIO, *March 1st*, 1883.

"Ninety days after date The Cincinnati and Eastern Railway Company promises to pay to the order of W. R. McGill, at the Merchants' National Bank of Cincinnati, seven thousand dollars, value received, with interest at eight per cent.

"THE CINCINNATI AND EASTERN
RAILWAY COMPANY,
"By W. R. McGILL, *President.*"

There are no credits on said note nor any indorsements thereon.

Said defendant railway company is also indebted to this defendant in a large amount besides the above note, much of which has long been overdue.

3rd. This defendant is interested in having the same character of relief as prayed for by plaintiff, and says there is due to him from his codefendant, said railway company, on said promissory note, seven thousand dollars, with eight per cent. interest from March 1st, 1883, for which he asks judgment.

4th. This defendant further says that the present condition of said road and the facts alleged in relation to the same in the petition make it not only important but absolutely necessary to the proper protection of the interests of this defendant and other creditors of

said company that a receiver should at once be appointed to take charge of the road and other property of said company and
11 manage and control the same for the interests of the defendant and the other creditors of the company, and to do all such acts in the premises, under the direction of the court, as may best promote, protect, and preserve the interests of all parties and persons that may have interests and rights against said company, or that may be interested in its proper management.

5th. This defendant, in addition to his prayer for judgment on his said promissory note, asks that a receiver be at once appointed and directed to take charge of the road of said company, and of its rolling-stock and everything that pertains to said road, and all the property and effects of every kind belonging to or owned by said company, and manage and control the same as the court may direct in the interest of this defendant and of the other creditors of said company, and of all parties that have any interests therein, and that the court from time to time make all such orders in the premises, and for the direction of said receiver in the performance of his duties, as may be proper, and as the rights and interests of defendant and other creditors may require, and as the law and equity may warrant.

SWING AND LEMIN,
Att'ys for Defendant.

THE STATE OF OHIO, }
Clermont County, } *ss:*

W. R. McGill, being duly sworn, says that the facts stated
12 and allegations in his foregoing answer and cross-petition are true.

W. R. McGILL.

Sworn to by W. R. McGill before me, and signed by him in my presence, this 13th day of September, 1883.

[SEAL.] ALBERT SWING,
Notary Public in and for Clermont County, Ohio.

SEPT. 14, 1883.

Now comes the defendant in the above action, The Cincinnati and Eastern Railway Company, by its duly-authorized attorneys, and waives the issuing and service of process on the foregoing answer and cross-petition of W. R. McGill, and enters the appearance of said defendant to the same and waives notice of the application of said W. R. McGill for the appointment of a receiver in said action.

THE CINCINNATI AND EASTERN
RAILWAY COMPANY,
By THOMAS B. PAXTON, *Att'y.*

13 SEPTEMBER THE 14TH, 1883.

Entry, to wit:

This day (Sept. 14th, 1883), application being made to me, James B. Swing, judge of the probate court of Clermont county, State

of Ohio, by Stephen Feike and his attorney, C. W. Waters, for the appointment of a receiver in the above action, and it being made to appear that there is no judge of the supreme court, or of the district court, or of the court of common pleas now in Clermont county, and it appearing to me, the judge of the probate — of said county of Clermont, that a proper case is made by the petition and testimony in the above case for the appointment of a receiver in this action, and that W. R. McGill has also filed his answer and cross-petition asking that a receiver be appointed in this action, and that the defendant, the Cincinnati and Eastern Railway Company, by its duly authorized attorneys, has waived notice of this application for the appointment of a receiver, both on the application of the plaintiff and of the defendant, W. R. McGill, and is now present by its duly authorized attorneys, at the hearing of this application and consenting thereto:

It is therefore by me ordered and adjudged, by consent of parties, that Samuel Woodward, of the county of Hamilton and State of Ohio, be, and he is hereby, appointed receiver of the defendant, the Cincinnati and Eastern Railway Company, as prayed for in said petition and answer and cross-petition, and that he execute
14 bond in the sum of fifty thousand dollars, with sureties, to be approved by the clerk of the court of common pleas of Clermont county, Ohio, or the probate judge of Clermont county, Ohio, payable to the State of Ohio, which bond shall be for the benefit and use of the said railway company and all creditors thereof, conditioned for the faithful performance of his duties as such receiver, and as by law in such cases provided, and it is further ordered that said Samuel Woodward as soon as he shall be qualified as such receiver take charge of the road of the defendant, with all its branches and franchises, and of all rolling-stock, fixtures, and of all property, real and personal, of every kind belonging to said Cincinnati and Eastern Railway Company, or appurtenances to the road of said company, and that he proceed at once to operate said road, and manage, control, and direct the operations and management of the same — manner as in his judgment shall be for the best interests of the defendant and of all parties interested in the same, and that he collect and receive all revenues, claims, and dues now due or that may hereafter become due to the defendant, said Cincinnati and Eastern Railway Company, till the further order of the court of common pleas or some judge thereof shall be made in the premises, and that until such further order be made said receiver proceed to make
15 all necessary expenditures and contracts for the preservation and repairs and keeping in continuous repair all parts of said road, and to execute and — into effect and to completion, and all contracts heretofore made by the defendant for construction and repairs of any and all *parties* and parts of the road of said defendant, between the city of Cincinnati, in Hamilton county, and the city of Portsmouth, in Scioto county, Ohio, only under the order and direction of said court of common pleas which may be made hereafter in this cause, and the said receiver is hereby clothed with all the authority and rights usually given to a re-

ceiver by courts in equity to take charge of, care for, and operate a railroad, and make report of his acts and doings in the premises at least every three months during the continuance of said receivership; that said receiver is hereby authorized and empowered to prosecute and defend all actions that may now be pending in the different courts for and against — railroad company.

And the said Samuel Woodward thereupon comes and files his bond, which is approved by the probate —, and took his oath of office of receiver hereby conferred on him, and the said The Cincinnati and Eastern Railroad Company is hereby ordered and directed to transfer to said Samuel Woodward, receiver, all the property, rights, and privileges of every kind belonging to the said company described in the complaint filed herein.

That until further order of said court said receiver is hereby authorized to carry out in full force all the terms of a certain
16 contract made between the Cincinnati Northern Railway Company and the said Cincinnati and Eastern Railway Company, whereby trains of the latter company are permitted to use the tracks of the said Cincinnati Northern Railway Company, between the junction therewith and the — Cincinnati, Ohio, with certain terminal within said city, and also to carry out in full force and effect certain contracts and agreements heretofore made between said Cincinnati and Eastern Railway Company and the Cincinnati and Eastern Telegraph Company and the Western Union Telegraph Company, whereby said railroad company is provided with necessary and important telegraphic facilities, and further to carry out in good faith all agreements and leases between said railway company and sundry persons for locomotives and cars heretofore delivered to said railway company, and any other contracts which, in the judgment of said receiver, are necessary to the operation of said railway.

The within entry was made and approved by me this 14th day of September, A. D 1883.

JAMES B. SWING,
Probate Judge.

The clerk of common pleas will enter this on journal as of date of September 14th, 1883, to be entered as an order at chambers.

D. W. C. LOUDEN,
Judge Com. Pleas, 5th District of Ohio.

17 SEPT. 14.

Entry, to wit:

This day (Sept. 14th, 1883) came Samuel Woodward, who was heretofore, on the same day, by the probate judge of said county, duly appointed and qualified as receiver of the said Cincinnati and Eastern Railway Company, and filed his bond pursuant to the order of said probate court, and which bond was duly approved and filed by the clerk of this court.

SEPT. 14th, 1883.

Bond of receiver approved and filed.

SEPT. 20TH.

Entry, to wit:

This day (Sept. 20th, 1883) this cause came on to be heard before the Honorable D. W. C. Louden, sitting in chambers, on motion of the receiver heretofore appointed in this cause, and it appearing to the said judge that at the time of the appointment of said receiver the said railway company was indebted to the employees of said company for services in operating said railroad, it is therefore, by the consent of parties, ordered that said receiver, after paying the operating expenses of said railroad and debts incurred by him since his appointment, shall apply any earnings of
18 said railroad from time to time as he may deem for the interest of all parties to this action to the payment of the debts due from said company to said operators at the time of his said appointment.

D. W. C. LOUDEN,
Judge Com. Pleas, 5th Dist. of Ohio.

SEPT. 20.

Entry, to wit:

And now comes the plaintiff and suggests to the Hon. Judge D. W. C. Louden, at chambers, that R. M. Shoemaker, T. Q. Ashburn, M. Jamison, P. F. Swing, and L. W. Bishop are trustees under various mortgages given by the defendant, The Cincinnati and Eastern Railway Company, and, therefore, appear to have an interest in the subject-matter of the action and are proper to be made parties thereto; and same being consented to by defendants, hereby ordered that said R. M. Shoemaker, T. Q. Ashburn, M. Jamison, P. F. Swing, and L. W. Bishop, trustees, file their appearance in the case in writing and waive the issue and service of summons.

OCT. 4.

Waiver of trustees filed in words and figures following, to wit:

STATE OF OHIO:

Com. Pleas Court of Clermont County.

STEPHEN FEIKE, Pl'ff,
vs. } 7840.
19 THE CIN. AND EAST. R. R.

And now comes the undersigned, who have been made parties defendant in above case, and hereby enter their appearance and waive the issue and summons therein.

M. JAMISON, *Trustee.*
R. M. SHOEMAKER, "
P. F. SWING, "
T. Q. ASHBURN, "
L. W. BISHOP, "

OCT. 4.

Motion of W. R. McGill, filed in words and figures following:

THE STATE OF OHIO, — *Clermont:* Com. Pleas.

STEPHEN FEIKE, Plaintiff,
vs.
THE CINCINNATI AND EASTERN RAILROAD CO., Defendant.

Now comes the defendant, W. R. McGill, and represents to the court that he is a large creditor of the said Cincinnati and Eastern Railway Company, and that he holds a large amount of bonds received by the mortgage, copies of which are hereto attached, marked "A," "B," "B 2," "C," & "D," and made part of this motion; and further represents to the court that it will be to his and for the interests of all parties to the action, all creditors, bondholders, and stockholders of said railway company, that the receiver, Samuel Woodward, heretofore appointed in this action, shall have full and complete power to complete the construction of said railway from its most easternly point of its present completion near Henly station, Scioto county, Ohio, to and connect with the Scioto Valley railway near Portsmouth, Ohio, according to the plans and specifications heretofore made by said Cincinnati and Eastern Railway Company, as set forth in the report of said receiver filed in this action, and to which report this motion refers. And said defendant further represents that it will be necessary to and for the interest of himself, all parties to this action, all creditors, bondholders, and stockholders of said railway company, that the receiver shall have full and complete power to change the gu*a*ge of said railroad from a narrow to a standard gauge road from its junction with the Little Miami railroad at Batavia Junction, Hamilton county, Ohio, east bound to its connection with the Scioto Valley railway near Portsmouth, Ohio.

The defendant further represents that the company is largely indebted to various parties, as shown by said report of said receiver, and that it will be necessary, in order to complete said road, that the said receiver be empowered to issue certificates for the purpose of paying the indebtedness that may be incurred by him as such receiver in the completion of said road and changing the gu*a*ge thereof.

Wherefore this defendant moves the court to grant an order empowering said receiver to complete the construction of said road and change the gauge thereof, and to issue certificates for the purpose of paying expenses of such work in such manner and in such amounts as the court may deem just and proper.

SWING & LEMIN,
Att'ys for W. R. McGill.

* * * * * * *

22 STATE OF OHIO, } ss:
Clermont County, }

In the Court of Common Pleas. At Chambers.

STEPHEN FEIKE, Pl'ff,
vs.
THE CINCINNATI AND EASTERN RAILWAY COMPANY, Def't, } 7840.

(Journal, vol. —, Oct. 4, 1883, page —.)

This day this cause came on to be heard before the Hon. D. W. C. Louden, common pleas judge of the fifth judicial district of Ohio, at chambers, upon the motion of the defendant, W. R. McGill, filed herein this 4th day of Oct., 1883, and the testimony of the parties, and was argued by counsel, and the judge, being fully advised in the premises. does find that it is necessary to protect, and is for the best interest of all parties to this action, all creditors, bondholders, and stockholders of said railway company, that the receiver, Sam'l Woodward, heretofore appointed in this action, shall have full and complete power to proceed at once to complete the construction of said railway from the most easterly point of its present completion, near Henly Station, Scioto county, Ohio, and connect with the Scioto Valley railway near Portsmouth, Ohio, according to the plans and specifications of the said railway company, as set forth in the report of said receiver, filed herein this 4th day of Oct., 1883, to which report said motion here refers, and that it is necessary to and for
the best interest of all parties to this action, all creditors,
23 bondholders, and stockholders of said railway company, that the said railroad be changed from a narrow to a standard gauge road, from its junction with the Little Miami railroad at Batavia Junction, in Hamilton county, Ohio, eastward to the connection with the Scioto Valley railway near Portsmouth, Ohio.

It is therefore ordered by the judge that said receiver, Sam'l Woodward, be, and is hereby, empowered to proceed at once to complete said railway from the most easterly point of its present completion, near Henly Station, Scioto county, Ohio, to and connect with the Scioto Valley railway near Portsmouth, O, according to the plans and specifications of said railway company, as shown by the said report of the said receiver, and that he be, and is hereby, empowered to make contracts for and change the gauge of said railway from its junction with the Little Miami railroad at Batavia Junction, Hamilton Co., O., to its connection with the Scioto Valley railway, near Portsmouth, O.

And the judge further finds that it will be necessary, in order that the said receiver may complete the construction and change the gauge of said railway, that he issue receiver's certificates for the purpose of paying the expenses thereof.

It is therefore ordered by the judge that said receiver be, and is hereby, empowered to issue certificates, the aggregate amount of which shall not exceed $250,000, and in such denomination as in the

best judgment of said receiver it may be proper and just;
24 said certificates to be redeemable in 6 months and payable in
3 years, and to bear 6 per cent. interest from date of issue, and shall be issued for no other purpose whatever save and except for the completion of the construction and change of gauge of said railway, and that said receiver is hereby empowered and authorized to negotiate, sell, and borrow money upon said certificates for the purpose of completing the construction and changing the gauge of said road as aforesaid, and that said certificates when so issued shall be the first and best lien upon the said railroad and property of every kind whatever, and the franchises of said company, after the payment of the operating expenses of said railway incurred by said receiver, and the payments of the amounts due operators of said railway at the time of the appointment of the said receiver.

* * * * * * * *

25 Nov. 5.

Entry, to wit:

This day, on motion, leave is given T. Q. "Asburn" and R. M. Shoemaker, as trustees under the first mortgage mentioned in the petition in this case, to plead in this action by motion, demurrer, or answer, as they may elect.

* * * * * * * *

Nov. 5.

Amendment to petition filed in the following words and figures, to wit:

Amendment to Petition.

Court of Common Pleas, Clermont Co., Ohio.

STEPHEN FEIKE, Plaintiff.

vs.

THE CINCINNATI & EASTERN RAILWAY CO. *et al.*, Defendants.

The plaintiff comes and, in obedience to the order of the court requiring him to separately state and number the several causes of action herein, and, by way of amendment to the 3rd cause of action stated in the original petition, leave to file which being first had & obtained, &, in addition to & without withdrawing the averments or prayer therein stated and to be inserted immediately following the word judgment at the end of paragraph 5 of his second cause of action, says that the defendant, the Cincinnati & Eastern
26 R'y Co., is indebted to him on the promissory notes recited in his first and second causes of action for the amounts set forth in said recited notes & first & second causes of action, to which reference is hereby made, & he prays that the same may be treated & considered as if separated and at large set forth in this cause of action.

The plaintiff further says that at the times the said promissory notes were delivered to him, and as a part and parcel of the consideration for such delivery, the said defendant R'y Co. duly promised

& agreed to secure the payment of the said notes by the delivery to the plaintiff of its certain bonds, at the rate of seventy-five per cent. of their par value, in a sum equal to the face of said notes, which bonds were secured by the execution and delivery of its 3rd mortgage, & covering & embracing its entire property, real & personal & mixed, to P. F. Swing, as trustee; that said bonds were a part of a series of two millions of dollars in bonds, which were secured by the mortgage aforesaid; that the purpose of issuing that amount of bonds was, in substance, to redeem & cancel all outstanding mortgage bonds of the first & second series which had been theretofore issued to fund the floating debt of said def't Co., & to complete the construction & equipment of its railroad; that said mortgage deed, after its proper execution & delivery to said trustee as aforesaid, was, on the — day of Dec., A. D. 1881, at —— o'clock — m., left with the recorder of Hamilton county, O., to be by him entered of
27 record, and was by him recorded, on the — day of December, A. D. 1881, in book No. ——, mortgage records, & was thereafter prior to April, 1882, duly recorded in each of the several other counties through which said road runs, and is & was intended to be built, to wit, Clermont, Brown, Adams, Scioto, Lawrence, & Gallia, and the indebtedness for which said notes were given, & said bonds were to be delivered as collateral security as aforesaid, work & material performed & furnished by the plaintiff for said defendant Co., at its request, toward the construction of its said railroad, and materials having been furnished after the delivery and record of said mortgage deed and upon the faith thereof.

The plaintiff further says that he has recently, to wit, within about the last six months, completed the construction of thirty miles of defendant Co.'s road, in Adams & Scioto counties respectively; that said portion of the road includes that part for which the notes aforesaid were given; that, in addition to the amount of said notes, there is a large sum of money due the plaintiff from the defendant Co. for his work and materials furnished on said thirty miles of railroad, but that his claim therefor is unliquidated, and the precise sum due is at present unknown, and owing to the use by the defendant company, upon other parts of the road than the above part stated, of the materials of plaintiff, which he had purchased
28 to be used on the portion of the road covered by his construction contract, it is impossible to ascertain or state at present the exact sum of money due & owing this plaintiff by the defendant Co., and that it will be necessary that an account be taken & stated in order to determine the correct amount of said indebtedness.

He further states that his said work was done and materials furnished as aforesaid upon the defendant's request & upon a like promise & agreement to that hereinbefore stated, to secure the payment therefor, with 3rd-mortgage bonds, which were secured in the manner hereinbefore stated.

He further states that, in addition to the foregoing, the def't Co. is also indebted to the plaintiff in a large sum, being interest due and unpaid upon its first series of bonds, which are duly secured

as a first lien upon the defendants' property, real, personal, & mixed, by its first-mortgage deed, which he avers was duly executed, delivered, and recorded, but the dates of which he is now unable to state.

He further says that said def't Co. is also largely indebted to various other persons upon divers & sundry claims, to wit: For interest upon its various classes of bonds, for wages of its employees, for material and supplies, which have been furnished for the construction and operation of its railroad, for judgments in the various counties aforesaid for various amounts; that it is also threat-
29 ened with many suits by its creditors, & that there are now many suits pending against the said defend. Co. in said counties.

Nevertheless the plaintiff avers that the said defendant Co. has neglected & refused to deliver to him any part of the 3d mortgage bonds aforesaid, which were to be given to him as collateral security for the payment of said notes and the amount due in addition thereto on account of construction as aforesaid, & instead thereof has, in violation of his rights, placed many, but not all, of said bonds elsewhere and beyond its control to secure other & inferior claims to that of the plaintiff, but the precise amount of said bonds which it has retained, and also which it has placed elsewhere as aforesaid, it declines to disclose to this plaintiff, and he is unable to state the same; that the said defendant has neglected and refused to apply the earnings of its road, or any part thereof, to the payment of any part of its said indebtedness, and on the contrary has applied it to other & different purposes to this plaintiff unknown, and that the said defendant Co. is now, and has been for several months, totally insolvent & wholly unable to pay any material part of its indebtedness.

He further says that the defendant, said railroad, is completed sufficiently to admit of its operation from Cincinnati, in Hamilton county, Ohio, to Henly station, in Scioto Co., Ohio, a distance
30 of about eighty-six miles; that the distance thence to the junction of the Scioto Valley railroad, near Portsmouth, is about fourteen miles; that even though the part aforesaid is operated, many portions of it are in such condition as to require immediate & extensive repairs in order to make the road safe for public travel; that the portion between Henly station and the junction aforesaid has been substantially graded, & portions of the bridges & tressels have been built, yet said grading, bridging, and tresseling are in such an incomplete and insecure state that they are in imminent danger of being substantially destroyed by the elements, in that the fills will crumble & waste from the effects of the rain & the tresselling & bridges are not in a condition to resist the effects of freshets, & that the defendant Co. is in such condition & financial distress as to be utterly unable to make the repairs and complete the work in a manner and to an extent which is now essential to the public safety and the preservation of the R'y Co. property, & likewise essential to the security of the persons, including the

plaintiff, who have and are entitled to liens as aforesaid upon said property.

WHITE & WATERS,
Att'ys for Plaintiff.

STATE OF OHIO, *Brown County,* } ss:

Stephen Feike, the above-named plaintiff, being sworn, says that the facts stated & allegations in his foregoing amendment to his petition are, as he believes, true.

31 STEPHEN FEIKE.

Sworn to by said Stephen Feike before me, and by him subscribed in my presence this 5th day of November, 1883.

C. C. BLAIR, *Clerk.*

* * * * * * * *

NOV. 5TH.

Separate answer of R. M. Shoemaker, trustee, to the petition of plaintiff & to cross-petition of W. R. McGill, filed in the following words & figures, to wit:

Separate Answer of R. M. Shoemaker, Trustee.

Common Pleas Court, Clermont Co., State of Ohio.

STEPHEN FEIKE, Plaintiff,
vs.
THE CINCINNATI & EASTERN RAILWAY CO. *et al.*, Def'ts. } No. 7840.

And now comes R. M. Shoemaker, one of the defendants in this cause, and for separate answer to the plaintiff's petition & cross-petition of W. R. McGill — that on the 25th day of June, A. D. 1876, the Cincinnati & Eastern R'y Co., also a defendant herein, executed its certain mortgage deed conveying in trust to T. Q. Ashburn and this defendant, as cotrustees, & their & his successors, heirs, and assigns all and singular the railroad of said company con-
32 structed or to be constructed from the city of Cincinnati, in the county of Hamilton, Ohio, through the counties of Clermont, Brown, & Adams to the city of Portsmouth, in the county of Scioto, in said State, together with all the real & personal property & the income of said company, its lands, tenements, & hereditaments, rights of way, fixtures, bridges, structures, &c., and all the estates, legal & equitable, which were then or should thereafter be owned or acquired by said company; to have and to hold the same in trust for the benefit, security, & protection of the party or persons holding the bonds issued by said company pursuant to the terms and conditions of said deed in and of the construction and equipment of said railroad, on the line thereof as aforesaid, to the amount in the aggregate of five hundred thousand ($500,000) dollars, said bonds bearing date June 26th, 1876, and interest at the rate of seven (7) per centum per annum from July 1st, 1876, and maturing on the

first day of July, A. D. 1876, all & more specifically set forth in said mortgage deed, a copy of which is filed with the motion of W. R. McGill in that cause, and to which reference is hereby "made a part thereof."

This defendant further says that said mortgage deed was duly recorded in offices of the respective recorders of the counties thro- and into which said line of railway passes as aforesaid; that said mortgage is a first and best lien on all the property, rights,
33 and franchises of said company as expressed herein, and the entire issue of said bonds, amounting to the sum of five hundred thousand dollars ($500,000) dollars, as the defendant is informed and believes, is outstanding & unpaid.

Defendant further says that said deed contained a defeasance clause in the usual form, providing for the action of the trustees in case of default in the payment of either the interest as it became due on said bonds or the principal at maturity, & that there had been no default in the payment of the interest.

And further answering this defendant avers that he has no knowledge of the plaintiff's claim, or of that set out in the cross-petition of W. R. McGill, and therefore denies the same and demands proof; that he had no notice or knowledge of the application for either the appointment of a receiver in that case on the 24th day of Sept., 1883, or the application for and the entry on the journal on the 4th day of October, 1883, of the order authorizing and empowering the receiver to issue certificates of indebtedness, to be a lien prior and preferred to the lien of the 1st-mortgage bonds, hereinbefore described; that this defendant was not made a party to this order until the day said last-named order was made & entered upon the journal of this court, to wit, Oct. 4th, 1883, and did not then and does not now consent to either of said orders; that at the time when the appearance of this defendant was entered in this cause it was
34 understood between counsel for the receiver & the defendant that nothing further than the mere entry of his appearance should be done without first submitting the same to defendant. Defendant also avers that the lien of said first-mortgage bonds covers and extends over the entire line constructed and to be constructed, the city of Cincinnati, O., & Portsmouth, Ohio, including the entrance into the former city, & that the order in this cause, of date the 4th day of October, 1883, before referred to, authorizing the issuance of the receiver's certificates, provides only for the expenditure of the fund so realized on the line of said railroad between Portsmouth, Ohio, and the junction with the Little Miami railroad, at Batavia Junction, and does not permit or provide a like change of gauge between Batavia Junction and the city of Cincinnati, Ohio, thus adding to the entire line an additional and superior line, and at the same time rendering that portion between Batavia Junction & Cincinnati less valuable in case the gauge is changed to the standard guage, as the order contemplates, it becoming impossible to operate the line covered by the mortgage as an entirety, owing to the difference in gauge.

Wherefore this defendant is — all things to act as this court shall

direct, & prays the judgment and direction of the court in regard to his duties in the premises, and that the interests of his trust be protected.

MATTHEWS & SHOEMAKER,
Att'ys for R. M. Shoemaker, Trustee.

35 * * * * * * * *

FEB'Y 21, 1884.

Answer and cross-petition of Lomas Forge and Bridge Co. filed in the words and figures following, to wit:

Answer and Cross-Petition of the Lomas Forge & Bridge Works.

THE STATE OF OHIO, *Clermont County, ss:*

STEPHEN FEIKE, Plaintiff,
vs.
THE CINCINNATI AND EASTERN RAILROAD COMPANY *et al.*

And now comes the Lomas Forge and Bridge Works, and, having been made a defendant in the above case, appears and, by way of cross-petition, says:

That it is a partnership organized for the purpose of and doing business under said name in the State of Ohio and engaged in the city of Cincinnati in the manufacture and sale of railroad frogs, switch stands, and other articles used by railroads; that on the several days stated in the account hereto attached and made part hereof and marked Exhibit "A" they sold and delivered on the *the* orders of its officers to the said defendant, The Cincinnati & Eastern Railway Company, the several articles stated in said account and at the prices and of the fair market value therein stated; said goods amounting in the aggregate to three hundred and eighty-two $\frac{81}{100}$ dollars; that all of said good- were used by said defendant in keeping in repair and extending its road and in conducting
36 its regular business, and were such as were properly payable out of the current earnings of said road as part of the regular expenses of the same, and said railroad agreed to pay for the same in cash out of its said earnings.

The defendants further state that the said defendant did not apply its daily earnings and receipts from its business to the payment of said goods so furnished by these defendants, although they aver that said company has during all said time been in receipt *of* said sources of sufficient income to pay for said goods as well as all of its current expenses, but said defendant, contrary to its duty in the premises and its said agreement, applied the same in a large part thereof to paying to the bondholders the interest on the bonds secured by a mortgage on its road and in extending and making additions to and betterments on said railroad, thereby largely increasing the value of the property covered by the mortgage thereon.

These defendants further state that the said defendant railroad company has no property or assets from which the debt to them

can be collected, all of its assets having been turned over to the receiver appointed in this case, but they aver that they are entitled in equity to be subrogated to the rights of said bondholders in the said property and assets to the extent of the monies so diverted from the payment of current expenses within six months
37 prior to the appointment of such receiver, and used in paying the interest due to bondholders and in extending said road and increasing the security of the said mortgagees. And defendants aver that all of said indebtedness accrued within said period of six months, and in fact within four months of the appointment of said receiver.

Defendants therefore pray that the sum so due to them be ordered by this court to be paid out of any money in the hands of the receiver, or that may come into his hands, either from the business of the road or from any sales of property or assets hereafter made in this case, and for such other and further relief as he may be entitled to.

JOHN W. HERRON,
SWING & McINTOSH,
Solicitors for Defendants.

STATE OF OHIO, *Hamilton County,* } *ss:*

Thomas Morris, one of the said defendants, makes oath that the facts stated in the foregoing answer and cross-petition he believes to be true.

THOS. MORRIS.

Sworn to before me and subscribed in my presence this 16th day of February, A. D. 1884.

[N. P. SEAL.] "NACY & EUCHUMAN" DAVIS,
Notary Public, Ham. Co., O.

38 * * * * * * * *

MAY 2.

Entry, to wit:

The 2nd day of May, 1884, this cause came on to be heard before the Hon. D. W. C. Louden, common pleas judge of the 5th district (judicial) of Ohio, at chambers, upon motion of the plaintiff, Stephen Feike, filed herein April 30th, 1884, and the testimony of the parties, and was argued by counsel, and the judge, being fully advised in the premises, does find that it is necessary to protect, and is for the best interests of all parties to this action, also creditors, bondholders, and stockholders of said railway company, that the receiver, Samuel Woodward, shall have full power at once to secure the right of way, construct and complete the said railway from its junction or point
39 of crossing the Scioto Valley railway into and through the city of Portsmouth, Ohio, to a connection with the Portsmouth branch of the Cincinnati, Washington, & Baltimore railroad, within said city of Portsmouth; and, further, that it be necessary that the said Samuel Woodward, receiver, secure grounds for the terminal facilities and erect the necessary depot and other buildings

for the business of said railway. And the judge further finds that in securing said right of way it will become necessary to purchase in fee-simple and lease for a term of years, with privilege of purchase, the proper ground for right of way and terminal facilities, — appropriate and condemn property for said purposes, in accordance with the law governing such cases.

It is further ordered that the said receiver, Samuel Woodward, be, and is hereby, empowered at once to secure the right of way, construct, and complete said railway from its junction or the point of crossing the Scioto Valley railway into and through the city of Portsmouth, Ohio, to a connection with the Portsmouth branch of the Cincinnati, Washington and Baltimore railroad, within said city of Portsmouth, and secure grounds for terminal facilities and erect the necessary depot and other buildings for the business of said railway, and purchase the necessary grounds in fee-simple, or lease for a term of years, with privilege of purchasing, the
40 proper grounds for right of way and terminal facilities, and institute and prosecute proceedings to appropriate and condemn property for said purpose, in accordance with the law provided for such cases.

It is, therefore, ordered that said receiver be, and he is hereby, empowered to issue certificates, the aggregate amount of which shall not exceed sixty thousand dollars, in such denomination as such receiver shall deem proper, said certificates to be redeemable in six months and payable in three years, and to bear six per cent. interest per annum from date of issue, the interest payable semi-annually. And said receiver is hereby authorized and empowered to negotiate, sell, and borrow money upon said certificates for the purpose hereinbefore specified. And it is ordered that said certificates, when so issued, shall be the first and best lien upon that part of the railway and all property of the company acquired under this order, and shall be a lien upon all other property of the company next in priority to the certificates of said receiver authorized to be issued by this court by order made on the 4th day of October, A. D. 1883.

D. W. C. LOUDEN, *Judge.*

* * * * * * * *

41 JUNE 3RD, 1884.

Answer and cross-petition of Cambria Iron Co. filed, in the words and figures following, to wit:

Answer and Cross-Petition of the Cambria Iron Co.

STATE OF OHIO, *Clermont County:*

Court of Common Pleas.

STEPHEN FEIKE, Pl't'ff,
vs.
THE CIN. & EAST. R'Y CO *et al.*, Def'ts. } No. 7840.

Now comes the Cambria Iron Company, [and], by leave of court, files this its answer and cross-petition.

Said Cambria Iron Company states that it is a corporation under the laws of Pennsylvania, with powers to make and vend steel and iron rails and other railway supplies; that on the 17th day of April, 1883, it entered into a contract with the defendant, the Cincinnati & Eastern Railway Company, whereby it undertook and agreed to sell and deliver unto said railway fifteen hundred gross tons of best quality of steel rails of Cambria Iron Company's pattern, No. 63, weighing fifty-six pounds per lineal yard, said rails to be thirty feet in length, except ten per centum thereof, which it was agreed might be in shorter lengths of even feet, not less than twenty-four feet, said rails to be delivered in June, 1883.

Said railway company agreed to pay for said rails $40 per ton, cash on delivery of each lot of 500 tons. Said iron company delivered up to and including June 23rd, 1883, four hundred and
42 ninety-two tons, for which said defendant was bound to pay to it the sum of $19,697.34 and $1,157.22 freight charges upon said rails paid for it by said iron company, under its agreement. Said railway company did not pay said sum, but its officers assured this defendant that the said payment would be speedily made, and relying upon such assurances it omitted to retake said rails into its possession until August 13th, 1883, when said railway company paid to said iron company on account the sum of $5,000, and assured said iron company that the balance would be speedily paid.

This defendant relied upon said assurances until September 14th, 1883, when the receiver was appointed in this cause. But this defendant says that the said receiver, who had been the general manager of said railway company from April 17th, 1883, up to the date of his appointment as receiver, and who made said contract with this defendant, well knew that said rails had not been paid for, and that the title to said rails, except 125 tons thereof, was in this defendant and not in the said railway company; nevertheless, the said receiver took possession of said rails and has retained possession thereof to this date, and converted them to his use, and is now using the same upon the line of said railway.

This defendant, therefore, prays this court to order the said receiver to pay for said rails or deliver the same to this defend-
43 ant with payment of suitable compensation for their use, and and for all other necessary and proper relief.

Second. This defendant, for a second cause of action against said railway company, restates the allegations of the foregoing count, and further says that the said company refused to receive the remainder of said 1,500 tons, except 15 tons delivered September 26th, 1883, and paid for, to wit, 99.1269, although the same were duly tendered to it, to the damage of this defendant in the sum of $4,962.82, for which it prays the court to render judgment against said defendant.

RAMSEY AND MATTHEWS,
Att'ys for said Defendant.

STATE OF OHIO, }
Hamilton County, } *ss:*

William M. Ramsey, being first duly sworn, says he is the attor-

ney of the said defendant company, none of its officers being in this county, and that the statements of the foregoing answer and cross-petition are true, as he verily believes.

WM. M. RAMSEY.

Sworn to before me and subscribed in my presence this 27th day of May, A. D. 1884.

[SEAL.] E. L. DECAMP,
Notary Public, Hamilton Co., Ohio.

* * * * * * * *

44 JUNE 13, 1884.

Answer to Post & Co. filed in the words and figures following, to wit:

Answer and Cross-Petition of Post & Co.

Court of Common Pleas, Clermont County, Ohio.

STEPHEN FEIKE, Plaintiff,
vs.
THE CINCINNATI AND EASTERN RAILWAY COMPANY, Defendants. } 7840.

Now comes Post & Co., and, by leave of court, files this its answer and cross-petition. It states that it is a corporation, under the laws of the State of Ohio, engaged in the manufacture of railway supplies. That between the 5th day of May, 1883, and the 21st day of July, 1883, it contracted to sell, and did deliver upon the road of the defendant, a large quantity of merchandise, consisting of railroad spikes and Sampson angle bars and bolts, to be used by the said defendant in the construction of its road, for which the defendant, The Cincinnati and Eastern Railway Company, agreed to pay in cash the sum of sixty-seven hundred and twenty-six dollars and thirteen cents ($6,726.13) upon the delivery thereof; that between the 2nd day of May and the 25th day of June, 1883, the defendant contracted to sell, and did deliver upon the said defendant's railway,
45 and to be used in its construction, certain other merchandise, to the value of one hundred and fourteen dollars and thirty-three cents ($114.33) to be paid for by said railway company in cash on delivery. The items showing the character and value of said goods which the defendant agreed to pay as aforesaid are set forth on the account attached to and made part hereof, marked "Exhibit A." This defendant further states that between the 3rd day of February, 1883, and the 10th day of September, 1883, it contracted to sell and did deliver upon the line of said defendants' railway, and to be used in its construction, certain merchandise, consisting of railroad spikes, bars of iron, & steel, &c., the items of which, with the reasonable value thereof, which said defendant agreed to pay in cash on dilivery, are set forth in the account attached hereto and made a part hereof, marked "Exhibit A," amounting in all to the sum of seven hundred and seventy-eight dollars and forty cents ($778.40).

Said railway company did not pay the defendant the several sums, but its officers assured this defendant that said payment would be speedily made, and relying upon such assurances it omitted to retake said personal property into its possession until September 14th, 1883, when the receiver was appointed in that case.

This defendant says that said receiver had been the general manager of said railway company from February 3rd, 1883, up
46 to the date of his appointment as receiver, and made the several contracts of purchase with this defendant, and well knew that the personal property aforesaid had not been paid for, and that the title thereof was in this defendant and not in said railway company.

Nevertheless said receiver took possession of said property and has retained possession thereof up to the present time, and converted the same to his use, and is now using the same upon the line of said railway.

This defendant therefore prays the court to order the receiver to pay for said property, or to deliver the same to this defendant with payment of suitable compensation for its use, and for all other proper relief.

HEALY & BRANNAN,
Att'ys for Post & Co.

STATE OF OHIO, } ss:
Hamilton County, }

E. V. Cherry, being duly sworn, says he is vice-president of the defendant, Post & Co., and that the facts stated in the foregoing answer and cross-petition are true as he believes.

E. V. CHERRY.

Sworn to & signed before me June 7th, 1884.

[SEAL.] CHAS. H. JONES,
Notary Public, Ham Co., Ohio.

* * * * * * * *

47 JULY 19, 1884.

Cross-petition of D. M. Richardson filed in the words and figures following, to wit:

"EXHIBIT A."

STATE OF OHIO, } ss:
Scioto County, }

D. M. Richardson, being duly sworn, says the Cincinnati and Eastern Railway Company is a corporation, being duly organized under the laws of Ohio, and engaged on the dates and at the times hereinafter mentioned in the construction of a line of railroad from the city of Cincinnati, O., to the city of Portsmouth, Ohio, with numerous branches.

That on the 20th day of June, 1883, this affiant entered — a contract with said railway company for the construction of a portion of

said line of railroad, to wit: To furnish all the material to be used therein and to construct the first-class masonry, trestle-work, and piling required for the crossing of the Ohio canal by said railroad, near Powder Mill locks.

Also all the piling and trestle-work for the new towpath along said canal; also all the piling and trestle-work in the approaches to and about each end of the said river bridge, where the said railroad crosses said Scioto river, which contract was evidenced by a writing signed by the chief engineer of said road, setting forth the terms thereof and the prices to be paid for said material
48 and work, that under and by virtue of said contract this affiant, as contractor with said company, furnished materials and performed work; a correct account of the kind and amount of which materials and work furnished and performed is hereto attached, marked "Exhibit A," and made a part hereof. No part of said amount has been paid; affiant says said material was furnished and said work done in said Scioto county for the benefit of said railway company at the times set forth in said account and at the places upon said road above.

Affiant says he cannot give the exact sections upon which said work was done, but that to the best of his belief it was sections 101, 102, 103, & 104, as numbered on the extension of said road east from Cincinnati, Ohio, to Portsmouth, Ohio.

Affiant says he ceased furnishing said materials and performing said work on the 14th day of September, 1883.

That there is due him on said account from said railway company the sum of eight thousand and eighty dollars and eighty-three cents ($8,080.83), with interest from September 15th, 1883. Affiant claims a lien under the statute in such cases made and provided upon the railroad of said Cincinnati and Eastern Railway Company.

D. M. RICHARDSON.

Sworn to and subscribed before me this 22d day of October, 1883.

49 [No seal.]

GEO. M. OSBORN,
Notary Public, Scioto County, Ohio.

* * * * * * * *

JULY 22.

Entry, to wit:

In chambers. July 22nd, 1884.

This day came Samuel Woodward, receiver hereinbefore appointed, and presents to the court a special report upon the subject of locomotives and rolling-stock necessary to be acquired in order to properly equip and operate the said railway, and the said application having been heard and fully considered by the Hon. D. W. C. Louden, judge of said court, in chambers, it is by him found that the purchase of said locomotives and other rolling-stock is necessary for the equipment and operation of the said railway, and is of benefit and for the best interest of all parties to this case and all interests involved.

It is therefore ordered that said Samuel Woodward, receiver, have authority to acquire by purchase three locomotives, four passenger coaches, two combined baggage and mail cars, twenty box cars, and twenty flat cars, at a cost in the aggregate not to exceed sixty thousand dollars, and in payment of said locomotives and rolling-
50 stock the said receiver is hereby empowered to issue receiver's certificates of indebtedness, divided into series or sets, each set to extend through a period not to exceed twenty-four months, and maturing one at the expiration of each month, so as to make twenty-four monthly payments, and certificates to bear date at the time of delivery of the rolling-stock to him, payable each with not to exceed seven per cent. interest from said date.

And it being the intention *of* said certificates shall be paid as far as possible out of the earnings of said railway said receiver is hereby empowered until further order to pay off and settle out of any money in his hands that he can appropriately apply any and all of said certificates so maturing monthly, as above provided.

* * * * * * * *

JAN. 6, 1885.

Answer and cross-petition of R. M. Shoemaker and T. Q. Ashburn, trustees, filed in the words and figures following, to wit:

Answer & Cross-Petition of Robert M. Shoemaker and Thomas Q. Ashburn, Trustees.

Clermont Common Pleas.

STEPHEN FEIKE, Plaintiff,
vs.
THE CINCINNATI AND EASTERN RAILWAY CO. *et al.*, Def'ts. } No. 7840.

51 Now comes Robert M. Shoemaker and Thomas Q. Ashburn, trustees, and by way of answer and cross-petition herein say that at the date hereinafter mentioned the defendant, The Cincinnati & Eastern Railway Co., was a corporation organized under the laws of the State of Ohio for the purpose of building, equipping, owning, & operating a railroad from the city of Cincinnati, in the county of Hamilton, in said State, to the city of Portsmouth, in the county of Scioto, in said State, through the counties of Hamilton, Clermont, Brown, Adams, & Scioto, having its principal office in the town of Batavia, county of Clermont, in said State, and had located its said road through the counties aforesaid, and had acquired certain rights of way, privileges, and other property for the purposes of said company, and, being desirous of obtaining additional money for the purpose of building said road and equipping the same, have been thereunto duly authorized by a meeting of the stockholders held according to law on the 17th day of June. The board of directors of said railway company, at a meeting held at the said town of Batavia, passed the following resolutions, viz:

(Here follows a copy of said resolutions, declaring it to be expedient & necessary for the company to borrow $500,000 for the purposes of the construction of the road, and authorizing the president

to issue and negotiate bonds therefor, and to execute and deliver to R. M. Shoemaker and Thomas Q. Ashburn, trustees, a mortgage securing the same on all the property of the company, real
52 and personal, including its franchises, privileges, income, recourses, interests, road, equipments, machinery, appendages, & appurtenances then owned or thereafter to be acquired. Then follow allegations of the issue of said bonds and of the execution and recording of said mortgage to secure the same and of default thereon; this abbreviated statement being inserted in this transcript by consent and direction of counsel.)

These defendants further allege that by reason of the default of the said company continued as aforesaid the principal sum of said bonds has become due; that the mortgage above set forth constitutes the first & best lien upon property therein described & all the property, rights, & franchises of said company now existing, and is superior to the lien on the receiver's certificates & to the liens claimed by contractors and other persons furnishing material and all parties who have filed cross-petitions in this cause.

Wherefore the said defendants pray the court to enter a decree in favor of these defendants foreclosing the interest of the said railway Co. in the property described above; to find the amount due on account of said bonds and interest, and to order and direct that unless the said sum, consisting of the principal & interest of said bonds, be paid forthwith, then the said property shall be sold without appraisement, and out of the proceeds thereof to direct the payment of the sum found due to these defendants, as trustees for holders of said bonds, and for such other and further relief as in equity they may be entitled to.

53 MATTHEWS & SHOEMAKER,
Att'ys for said Trustees.

* * * * * * * *

FEB. 5TH.

Demurrer to cross-petition of Cambria Iron Co. filed in the words and figures following, to wit:

Demurrer.

THE STATE OF OHIO, }
County of Clermont, } *ss:*

In the Court of Common Pleas.

STEPHEN FEIKE, Plaintiff,
vs.
THE CINCINNATI AND EASTERN RAILWAY COMPANY, Defendant.

1. David M. Richardson, defendant herein, demurs to the first cause of action of the cross-petition of the Cambria Iron Company, because facts sufficient to entitle said company to the relief therein prayed for are not stated therein.

2. Said defendant also demurs to the second cause of action in said cross-petition set forth, because in so far as said company claims

any preference over the other creditors of said Cincinnati & Eastern Railway Company facts sufficient to entitle it thereto are not stated in said second cause of action.

54 THOMPSON, McGILLIROY & HOLCOMB AND
WM. W. PRATHER,
Att'ys for David M. Richardson.

* * * * * * * *

Order of Reference Entry.

STATE OF OHIO, } ss:
County of Clinton, }

In the Court of Common Pleas.

STEPHEN FEIKE, Pl'ff,
vs.
THE CINCINNATI AND EASTERN R'Y CO. *et al.*, Def'ts.

At chambers, before the Honorable A. W. Doan, one of the judges of the court of common pleas of the second judicial district of Ohio, on the 5th day of August, A. D. 1885.

This day came the said Stephen Feike, David M. Richardson, & T. Q. Ashburn, trustee-, by their attorneys, and upon their motion, and by and with the consent of all the parties hereto, and the undersigned being duly advised in the premises, it is ordered that all questions and issues raised on the pleadings in this case as to the existence, validity, or priority of the various liens set up against said railway company be, and they are hereby, referred to John R. Richards, as a special master commissioner, to take the testimony and report the same to the court, and therewith his conclusions
55 on the law and facts involved in said questions and issues.

And said master shall require the witnesses severally to subscribe their testimony, and said master shall have power to summon & enforce the attendance of witnesses, compel the production of books, papers, and all documentary evidence, and grant adjournments the same as the court.

And it is further ordered that said master, as convenience shall require, may sit for the purpose of taking testimony & hearing the arguments of counsel at the following places, to wit:

At Cincinnati, in the county of Hamilton.
At Batavia, in the county of Clermont.
At Winchester, in the county of Adams.
At Sardina, in the county of Brown.
At Portsmouth, in the county of Scioto.

And it is further ordered that said trustee shall forthwith, after ten days' notice to the parties or their counsel, proceed to take said testimony & hear counsel at some one of the places above designated, and report his said findings and said testimony to this court by the first day of October, 1885, and, to expedite said proceedings, is empowered to employ a competent stenographer, and tax the reasonable expense thereof as costs.

A. W. DOAN, *Judge.*

56 * * * * *

Dec. 19.

Costs of J. R. Richards, master, $955.50 (J. 29, p. 202), filed in the words and figures following, to wit:

This day came J. R. Richards, special master, and filed his report of the proceedings under the former order of this court, and also his itemized statement of the moneys necessarily expended and liabilities necessarily incurred in the performance of his duties under said order, amounting to the sum of $955.50, and the court being fully advised, finding said expenditures and incurring of said liabilities to be reasonable and necessary to carry out the former order of this court, doth order the same to be taxed as costs in this case.

* * * * * * * *

Petition for Removal.

STATE OF OHIO, *Clinton County:*

STEPHEN FEIKE *vs.* THE CINCINNATI & EASTERN R'Y CO. *et al.*

DEC. 24.

Petition for removal filed in the words and figures following, to wit:

57 Now comes the Cambria Iron Company, a corporation organized under the laws of the State of Pennsylvania, with corporate power to make and vend iron and steel railroad rails and other railway supplies, and says that it is a citizen of the State of Pennsylvania, with its principal offices in that State; that the plaintiff in this action, Stephen Feike, is a citizen of the State of Ohio, and that all of the defendants, other than this petitioner, are citizens of the State of Ohio; that the action of the plaintiff, Stephen Feike, was brought to enforce alleged liens upon the line of railroad of the defendant, The Cincinnati and Eastern Railway Company, and that many cross-petitions have been filed by defendants asserting liens upon said property; that the claim of this petitioner asserted in a cross-petition filed in this cause is a claim for the recovery of specific steel-rails, or, in the alternative, payment therefor, said rails having been conditionally delivered by this petitioner to said railway company, and being in the hands of the receiver herein appointed, and being of the value of more than fifteen thousand dollars, and that the amount in dispute between this petitioner and the adverse parties in the cause exceeds fifteen thousand dollars, exclusive of costs.

Your petitioner further states that it has good reason to believe, and does believe, that from prejudice or local influence, and
58 from *local influence*, it will not be able to obtain justice in this court.

Wherefore this petitioner prays the removal of this cause into the circuit court of the United States for the southern district of Ohio, and tenders its bond for such removal.

CAMBRIA IRON COMPANY,
By E. J. TOWNSEND, *Prest.*

STATE OF PENNSYLVANIA, } ss:
Pennsylvania County, }

E. J. Townsend, being first duly affirmed, deposes and says that he is president of the Cambria Iron Company, petitioner in the foregoing petition for removal, and that the facts set forth in said petition are true as he verily believes.

E. J. TOWNSEND.

Affirmed before me and subscribed in my presence this twenty-first day of December, A. D. 1885.

[SEAL.] JOHN G. LAMP,
Notary Public.

DEC. 24.

Bond for removal filed in the words and figures following, to wit:

Know all men by these presents that we, the Cambria Iron Company, a corporation organized under the laws of the State of
59 Pennsylvania, and Augustus Wessel, are held and firmly bound unto the State of Ohio in the penal sum of one thousand ($1,000) dollars, for payment of which we do hereby bind ourselves and our legal representatives firmly by these presents.

The condition of the foregoing obligation is such that, whereas in a suit No. 5542 pending in the common pleas court of Clinton county, Ohio, wherein Stephen Feike is plaintiff and the Cincinnati & Eastern Railway Company and others are defendants, said Cambria Iron Company, one of said defendants, has filed its petition for the removal of said case to the circuit court of the United States of America for the southern district of Ohio, western division.

Now then, if the said Cambria Iron Company shall enter in said circuit court on the first day of its next session copies of the process against it, and of all pleadings, depositions, testimony, and other proceedings in the said cause, then this obligation shall be null and void; otherwise to be in force and effect.

In witness whereof we have herein set our hands and seals this 18th day of December, A. D. 1885.

CAMBRIA IRON CO., [SEAL.]
By E. J. TOWNSEND, *President.*
AUGUSTUS WESSEL. [SEAL.]

Signed, sealed, and delivered in presence of—
W. J. ROBINSON.
A. P. ROBINSON.

60 Whereas, on the 24th of December, 1885, the defendants, the Cambria Iron Company, filed in this court their bond, with Augustus Wessel, surety, for the removal of this cause to the circuit court of the United States of America for the southern district of Ohio, western division, which said bond was this day by this court approved.

A. W. DOAN,
Judge of the Court of Common Pleas, Clinton County, Ohio.

DEC. 24TH, 1885.

* * * * * * *

And afterward, to wit, on the 8th day of February in the year last aforesaid, came the said defendant herein, the said Thomas Q. Ashburn, trustee as herein aforesaid, by C. B. Matthews, Esq., and Stever & Harrison, his solicitors, and filed in the clerk's office of the court aforesaid in this cause his certain motion in the words and figures as follows, to wit:

Motion to Remand.

In the United States Circuit Court, Southern District of Ohio, W. D.

STEPHEN FEIKE, Plaintiff,
vs.
THE CINCINNATI & EASTERN RAILWAY CO. *et al.*, Defendants.

61 Now comes Thomas Q. Ashburn, surviving trusteee of the first-mortgage bondholders, and moves to remand this cause to the State court, on the grounds, first, that it is not a case removable within the acts of Congress; secondly, that the petition was not filed in time in the State court.

C. B. MATTHEWS,
STORER & HARRISON,
Attorneys for Ashburn, Trustee.

And afterwards, to wit, on the 10th day of February, in the year last aforesaid, an entry was made upon the journal of the court aforesaid in this cause in words and figures as follows, to wit:

Journal Entry W. 297.

STEPHEN FEIKE
vs.
THE CINCINNATI & EASTERN RAILWAY COMPANY *et al.* } 3848. Chancery.

This day this cause came on for hearing upon the motion of Thomas Q. Ashburn, trustee of the first-mortgage bondholders, to remand this case to the court of common pleas of Clinton county, Ohio, and was agreed by counsel; on consideration whereof, the court, being fully advised in the premises, grants said motion. It is, therefore, ordered and adjudged that this cause be, and hereby is, remanded to the common pleas court of Clinton county, Ohio. And it is further ordered that the Cambria Iron Company pay all costs of this suit in this court.

62 To which ruling of the court in remanding said cause the said Cambria Iron Company, by its solicitors, except, and pray an appeal to the Supreme Court of the United States, which is hereby granted and bond fixed at the sum of $500.

* * * * * * * *

63 And afterward, to wit, on the 12th day of March, in the year last aforesaid, came the said defendant, the said Cambria

Iron Company, by its solicitors, and filed in the clerk's office of the court aforesaid in this cause its certain appeal bond, clothed in the following words and figures, to wit:

Appeal Bond.

Circuit Court of the United States, Southern District of Ohio.

STEPHEN FEIKE
vs.
THE CINCINNATI AND EASTERN RAILWAY COMPANY *et al.*

Know all men by these presents that we, Cambria Iron Company, as principal, and Augustus Wessel, as surety, are held and firmly bound unto The Cincinnati and Eastern Railway Company in the sum of five hundred dollars, to be paid to the said The Cincinnati and Eastern Railway Company, its assigns or successors; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, by these presents.

Sealed with our seals. Dated this 12th day of March, 1886.

Whereas the above-named Cambria Iron Company has taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled action by the circuit
64 court of the United States for the southern district of Ohio:

Now, therefore, the condition of this obligation is such that [if] the above-named Cambria Iron Company shall prosecute its said appeal to effect, and answer all costs if it shall fail to make good its plea, then this obligation to be void; otherwise to remain in full force and virtue.

——— ———. [SEAL.]
(Signed) AUGUSTUS WESSEL. [SEAL.]

Sealed and delivered in presence of—
C. R. NEVIN.
ROBT C. GEORGI.

The above security is approved.

GEO. R SAGE,
District Judge of the United States, S. D. Ohio.

Affidavit of Surety.

SOUTHERN DISTRICT OF OHIO, *ss:*

I, Augustus Wessel, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities I am worth fifty thousand dollars in real estate in my own name, situate in the county of Hamilton.

AUGUSTUS WESSEL.

Sworn to before me the 12th day of March, 1886.
[L. S.] ROBT C. GEORGI,
Dep. Clk U. S. Cir. Ct, S. D. O.

65 And afterward, to wit, on the day and year last aforsaid, there was issued out of the clerk's office of the court aforesaid in this cause our certain citation to defendants in error, and which said citation so as aforesaid issued, with the return of the marshal of the district aforesaid serving said writ endorsed thereupon, is hereto annexed as follows, viz:

66 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

To Thomas Q. Ashburn, trustee of the first-mortgage bondholders, Greeting:

Whereas Cambria Iron Company has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the southern district of Ohio, made in favor of you, the said Thomas Q. Ashburn, trustee as aforesaid, and has filed the security required by law, you are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of Cincinnati, in the sixth circuit, this 12th day of March, in the year of our Lord one thousand eight hundred and eighty-six.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

GEORGE R. SAGE,
U. S. District Judge, S. D. O., Sitting and Holding Circuit Court, there being no Circuit Judge or Associate Justice in the District.

66½ CINCINNATI, *March 16th*, 1886.

I hereby accept service of the within writ for Thomas Q. Ashburn, trustee of the first bondholders, a copy of this writ having been delivered to me.

C. B. MATTHEWS,
Att'y for Thomas Q. Ashburn, Trustee.

Received this writ at Cincinnati, Ohio, on the 12th day of March, 1886, and on the 16th day of March, 1886, I served the within-named Thomas Q. Ashburn, trustee of the first-mortgage bondholders, with a true copy of this writ delivered to C. B. Matthews, Esq., attorney for said trustee, who accepted said service by endorsement hereon.

H. C. UMER, *U. S. Marshal, S. D. O.*
By RICHARD C. ROHNER, *Dep.*

1 service	2 00
1 copy	50
1 mile	06

[Endorsed:] United States circuit court, southern dis't of Ohio. No. 3848. Stephen Feike *vs.* The Cin. & Eastern Railway Company. Citation to appellee. Filed M'ch 16th, 1886. B. R. Cowen, clerk.

67 UNITED STATES OF AMERICA,
Western Division of the Southern District of Ohio:

I, B. R. Cowen, clerk of the circuit court of the United States within and for the division and district aforesaid, do hereby certify that the foregoing is a true and correct transcript of the portions therein specified of the original transcript from the common pleas court of Clinton county, Ohio, heretofore filed in this office in the cause therein named, and of the entire record and proceedings, other than the said transcript, of the said the circuit court of the United States within and for the district aforesaid, as the same remains on file and of record in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of the court aforesaid at Cincinnati, in the division and district aforesaid, this 16th day of March, A. D. 1886.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

B. R. COWEN, *Clerk*,
By ROB'T C. GEORGI, *Deputy*.

68 Supreme Court of the United States.

CAMBRIA IRON COMPANY, Appellant,
vs.
T. Q. ASHBURN, Surviving Trustee, Appellee.

It is agreed between counsel for the appellant and counsel for the appellee that the foregoing transcript contains all of the record in the court of common pleas which is material to the consideration of the questions involved in this appeal. This agreement is made solely to the end that the record on appeal may not be encumbered with voluminous and immaterial matter.

The pleadings omitted are the answers and cross-petitions of the trustees of the second, third, and fourth mortgages upon the road, which, together with the first mortgage, constitute all the mortgages thereon. There are also omitted the answers and cross-petitions of various persons made parties defendant, who severally claim equitable liens upon said railroad for supplies furnished and labor performed in keeping it in repair and operating it for a period prior to the receivership. Said equitable liens are claimed on the ground that said supplies and services were properly payable out of the current earnings of the road; that the company, instead of paying therefor, diverted its current earnings to the payment of
69 interest on its bonds and in the making of lasting and valuable improvements on its line, and that said cross-petitioners are, therefore, entitled, to the extent of such diversions, to be paid out of the income of the receivership or the proceeds of the sale of the road in preference to bondholders.

Also the answers and cross-petitions of sundry defendants claim-

ing vendors' liens for rights of way and depot grounds sold to the railroad company, but not paid for.

Also the answers and cross-petitions of sundry defendants, setting up assignments of claims of operatives for work done within sixty days prior to the receivership, and alleging a lien therefor.

Also the answers and cross-petitions of sundry defendants, claiming mechanics' liens under the act of the General Assembly of the State of Ohio, passed April 6th, 1883, for material furnished and work done in the construction of the railroad.

Also the answers and cross-petitions of sundry defendants, claiming equitable liens for material furnished and work done in constructing portions of the railroad built after the execution of the mortgages, upon the ground that such construction enhanced the value of the road and entitled said cross-petitioners to be paid out of the proceeds of sale thereof before permitting the mortgagees to benefit by the additional valuable security to the railroad created by such construction.

The report of Special Master Richards, filed December 19th, 1884, embodies all of the evidence taken by him, and also his findings of law and fact upon the various claims of all the parties to the suit. It finds that the rails furnished by the Cambria Iron Company were laid before the appointment of the receiver.

70 No further proceedings were had in the court of common pleas after the filing of said report prior to the filing of the bond and petition of the Cambria Iron Company for removal, nor up to the present time, and all of the parties to the suit, except the Cambria Iron Company, are citizens of the State of Ohio.

The case was duly removed, April, 1885, by change of venue, under Rev. Stat. of Ohio, sec. 550, from the court of common pleas of Clermont county, Ohio to the court of common pleas of Clinton county, Ohio.

C. B. MATTHEWS,
Solicitor for Appellee.
RAMSEY, MAXWELL, & MATTHEWS,
Counsel for the Appellant.

March 17, 1886.

Endorsed on cover: S. Ohio C. C. U. S. No. 1296. The Cambria Iron Company, appellant, *vs.* Thomas Q. Ashburn, trustee of the first-mortgage bondholders. Filed March 22, 1886.

118-54

FILED
APR 5 1886
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 1,296.

THE CAMBRIA IRON COMPANY, APPELLANT,

vs.

THOMAS Q. ASHBURN, TRUSTEE OF THE FIRST MORTGAGE BOND-HOLDERS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR APPELLANT.

The case was removed from the State court into the Circuit court of the United States, under the local prejudice act of March 2, 1867, 14 Stat., 558; R. S. U. S., Sec. 639, cl. 3, upon the petition of the appellant, the Cambria Iron Company, a citizen of Pennsylvania, and was remanded to the State court upon the motion of the appellee.

The motion to remand was rested upon two grounds: first, that the case was not removable under the local prejudice act; secondly, that the petition to remove was not filed in time. The Circuit court held that the removal was in time; in other words, that there had not been a final hearing or trial of the suit in the State court; but that the case was not removable under the local prejudice act, and upon that ground the case was remanded to the State court.

The action in the State court was brought by a simple creditor of the Cincinnati & Eastern Railway Company to recover judgment upon his alleged indebtedness, and to obtain the appointment of a receiver, upon the allegation that the railroad was insolvent, and that its various creditors, some of whom had judgments, were seeking to enforce the collection of the same by levying upon the property of the company. The railway company entered its appearance, and a receiver was, by its consent, appointed. Trustees of the various mortgages upon

the railroad were subsequently made parties defendant, and also numerous other parties claiming liens upon the railroad.

The Cambria Iron Company, by leave of court, filed an answer and cross-petition, alleging that shortly before the appointment of the receiver it had sold rails to the railway company, of the value of about twenty thousand dollars, to be paid for in cash on delivery; that the same had been delivered to the company prior to the appointment of the receiver, but had not been paid for; that the title to the same remained in the Cambria Iron Company, but that the receiver, who had been the general manager of the railway company up to the date of his appointment as receiver, and who had made said contract with the Cambria Iron Company, and who, therefore, knew that the rails had not been paid for, and that the title thereto remained in the Cambria Iron Company, nevertheless took and retained possession thereof, and that the same were being used in the line of railway. The prayer was that the receiver should be ordered to pay for the rails, or to deliver the same to the cross petitioner, with payment of compensation for their use. There was also a general prayer for equitable relief. The rails had been laid, and had, therefore, become a part of the railway prior to the appointment of the receiver and payment therefor out of the receiver's funds, or by receiver's certificates, constituting a first lien upon the railway, was therefore the relief to which the Cambria Iron Company was entitled.

All of the parties to the suit, plaintiff and defendant, were citizens of Ohio, except only the Cambria Iron Company, which was a citizen of Pennsylvania, and to its claim every other party to the suit was adverse.

If the removal were asked under the act of 1875, it could not, under Trust Co. *vs.* Huntington, and numerous cases therein cited, be maintained. And the same would be true, under the local prejudice act, according to Myers *vs.* Swann, 107 U. S., 546, if any of the parties, whether plaintiff or defendant, adversely interested to the Cambria Iron Company were not citizens of Ohio. But the question is whether the Cambria Iron Company, everybody adversely interested being citizens of Ohio, is not entitled to remove the suit and contro-

versy raised by its cross-bill into the Federal court. If the same controversy against the same parties were raised by its original bill, the right of removal would be conceded. We submit that under the local prejudice act the right of removal is not affected by the circumstance that the suit to be removed is raised by a cross bill instead of by an original bill, provided on one side of the controversy, however raised, stands the non-resident citizen alone, and on the other side only citizens of the state on which the suit is brought.

The judiciary act of 1879, 1 Stat., 79, sec. 12, provided for removal only at the instance of the defendant, and when he was an alien, or the plaintiff was a citizen of the state in which the suit was brought, and the defendant was a citizen of another state. No provision was made for removal if the alien or non-citizen was one only of several defendants. That case was provided for by the removal act of July 27, 1866, 14 Stat., 306. Indeed, the only object of the act of 1866 was to provide for cases in which the alien or non-citizen defendant was not sole defendant, but one only of several defendants.

We submit that the local prejudice act also covers such a case :

1. Because the local prejudice act is an amendment, not of the judiciary act of 1879, which provided for removal only in case all of the defendants were aliens or non-citizens, but only of the act of 1866, which related exclusively to cases in which the alien or non-resident defendant was one only of several defendants.

2. Because the local prejudice act applied in terms, not simply to a suit which *is* a controversy between a citizen of the state in which the suit is brought, and a citizen of another state, but to a suit *in* which there is such a controversy, implying that the controversy for removal may be one only of several controversies in the case.

3. The very object of the local prejudice act is to give the non-citizen the right of removal in an extraordinary emergency. That emergency arises whenever, from prejudice or local influence, he is unable to obtain justice in the State court; and it is entirely immaterial whether his controversy arises upon a bill

or upon a cross-bill, so long as it is a controversy between himself on one side, and citizens of the state in which the suit is brought on the other.

What effect the removal may have upon the rest of the case, it is not now material to inquire. If the effect is to carry the entire case into the Federal court, the result is only that which is always brought about under the act of 1875, when a removal is granted at the instance of a defendant who has a separate controversy. If the protection of the non-citizen's rights requires the removal of the whole controversy into the Federal court, all parties are still in the court of their common country and no one is prejudiced.

The Circuit court held that there had not been a final hearing or trial in the State court prior to the filing of our petition for removal, and we submit that the correctness of that ruling is not open to debate.

Hess *vs.* Reynolds, 113 U. S., 80.

The case had been referred in the State court to John R. Richards as a special master commissioner, to take testimony and report the same to the court, with his conclusions on the law and facts involved in the issues. This reference was made under Rev. Stat. Ohio, 1880, Sec. 5,222, provided for masters, and in the precise terms of that section. The language of the order was broad enough, to be sure, to have constituted Mr. Richards a referee if the reference had been in fact made to him as a referee. But it was made to him in terms as a special master commissioner, and his report would have simply the effect of the report of a special master, subject to be excepted to and to be confirmed and modified or set aside by the court, as provided in Sec. 5,222, either prior to or at the time of the final trial or hearing of the case. The report of a referee is entirely different. Under Sec. 5,213 it stands as the decision of the court.

Bell *vs.* Crawford, 25 Ohio St., 402

WM. M. RAMSEY,
LAWRENCE MAXWELL, JR.,
MORTIMER MATTHEWS,
Counsel for Appellant.

118-54.

APR 5

Robert Clarke & Co., Printers, Cincinnati.] [April, 1889.

Supreme Court of the United States.

Cambria Iron Company,
Appellant,

No. 1,296.] *v.*

Thomas Q. Ashburn, Trustee,
Appellee.

C. B. MATTHEWS,
Counsel for Appellee.

Robert Clarke & Co., Printers, Cincinnati.] [*April, 1886.*

Supreme Court of the United States.

Cambria Iron Company,

Appellant,

No. 1,296.] *v.*

Thomas Q. Ashburn, Trustee,

Appellee.

This is an appeal from an order of the Circuit Court for the Southern District of Ohio, Western Division, remanding the case described below to the State Court.

It was sought to remove the case under the third paragraph of section 639 Revised Statutes United States, known as the "Local Prejudice" paragraph.

The suit of *Stephen Feike* v. *The Cincinnati and Eastern Railway Company*, and many other defendants, pending at the date of the filing of the petition for removal in the Court of Common Pleas of Clinton County, State of Ohio, might be described shortly as a foreclosure suit; a Receiver of the Cincinnati and Eastern Railway property had been appointed, who was and is operating the road under the orders of the court, and the plaintiff and the defendants, other than the railway company, are seeking the foreclosure of liens and settlement of priorities of liens;

under orders of the court, receiver's certificates have been issued. The appellant is a defendant in said suit, seeking by cross-petition to establish a claim against the Receiver as a preferred claim.

The appellant is and was, at the time of the filing of the petition, a citizen of the State of Pennsylvania, and all the other parties are and were citizens of the State of Ohio.

The questions involved in this appeal are, first: has such a cross-petitioner, who has a controversy in a suit, the right, under paragraph 3 of section 639, known as the "Local Prejudice" paragraph, to remove the case to the United States Circuit Court; and, secondly, if this first question be answered in the affirmative, whether or not the petition for removal was filed before a trial or final hearing in the State Court?

The court below remanded the case on the ground that the appellant's controversy was not a suit within the meaning of the law under which it was sought to remove it. The law reads that when a SUIT is between a citizen of the state in which it is brought and a citizen of another state, IT may be removed on petition of the latter, etc. The word *suit* defines what must exist in order to entitle a party to a removal, as well as the thing to be removed.

The words show that what is removable is co-extensive with that which is PENDING. If a suit of the nature described is pending, then IT (the suit) may be removed. The question then comes to this, can a defendant cross-petitioner, who is carrying on one out of a multitude of

controversies which go to make up the suit in question, be said to have A SUIT PENDING, removable under the act? If he has, then it follows from the wording of the act, "IT may be removed," that what is removed is only the issue raised on his cross-petition, for that is assumed to be a suit. The result would be that the appellant would be trying in the Federal Court its priority, while all other questions of priority, together with the custody of the property and right to order its sale, would remain in the State Court. If it is claimed that the whole suit would be removed, including all questions or controversies involved in it, then this evident fallacy is involved that the word "SUIT" means either the whole suit or a controversy or suit within a suit, but that the word "IT" means only the former, whereas both words necessarily designate identicallly the same thing.

The case of *The Sewing Machines*, 18 Wallace, 553, which arose upon the "Local Prejudice" act of March 2, 1867, would seem to necessitate this conclusion.

Secondly, it is submitted that the removal petition was not filed before trial or final hearing. The questions relating to the liens had been referred to a master, "to take the testimony in writing and report the same to the court, and therewith his conclusions on the law and facts involved in said questions and issues," who had taken the testimony, and reported as directed by the order before the removal was asked.

Under the Ohio Code such a reference is a trial. It is different from a reference, according to the rules of